No. 13421

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

[illegible]

vs.

[illegible]

[illegible]

vs.

[illegible]

APPELLEE'S BRIEF

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No. 15421.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NORIO KIYAMA,

Appellant,

vs.

JOHN FOSTER DULLES, as Secretary of State,

Appellee.

MIYOKO KIYAMA,

Appellant,

vs.

JOHN FOSTER DULLES, as Secretary of State,

Appellee.

APPELLEE'S BRIEF.

Statement of Jurisdiction.

On September 15, 1949, appellants filed their Complaint which charged that they had been denied a right and privilege as a national of the United States. [Tr. of R. 4.]* On December 16, 1949, their Complaints were severed and on December 21, 1949, appellee's Answers were filed. [Tr. of R. 6.] On June 2, 1950, Amended Answers to both Complaints were filed. [Tr. of R. 7-11.]

The cases were consolidated for trial which began July 10, 1956 and ended July 13, 1956. [Tr. of R. 16, 28.] On August 27, 1956, District Judge William M. Byrne rendered judgment in each case for the appellee. [Tr. of R. 27, 37.] Timely notices of appeal were filed on October 24, 1956. [Tr. of R. 38, 39.]

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*Tr. of R. refers to the Clerk's Transcript of Record. R. T. refers to the Reporter's Transcript of Proceedings.

The trial court had jurisdiction under Title 8 United States Code, §903. This court has jurisdiction of the appeal pursuant to the provisions of Title 28 U. S. C. §1291.

Statement of the Case.

Appellant Norio Kiyama was born on May 3, 1915 at Los Angeles, California, of Japanese parents, thus acquiring nationality of both the United States and of Japan. [R. T. 164; Tr. of R. 16.] He was brought to Japan in 1922 and left there to receive his schooling until 1931, at which time he returned to the United States when he was 16 years old. [R. T. 165; Tr. of R. 17.]

Plaintiff Miyoko Adachi Kiyama was born at Manhattan Beach, California, on October 21, 1921, of Japanese parents. [R. T. 44; Tr. of R. 28; Ex. T, R. T. 53, 106.] During 1928 she was taken to Japan and remained there until some time during 1938. [R. T. 45; Ex. W, R. T. 100, 106; Tr. of R. 29.]

Miyoko Adachi married Norio Kiyama in December 1938. [R. T. 47.] Neither Norio nor Miyoko Kiyama ever registered to vote in an American election. [Ex. A, R. T. 196-197; Ex. T, R. T. 53, 106.] The birth of their two children in 1939 and 1941 were registered with the Japanese Consulate in order that Japanese citizenship be obtained for the children. [R. T. 126-127.]

On April 29, 1942 the appellants, while residents of California, were evacuated along with other persons of Japanese descent. [R. T. 167; Tr. of R. 17, 29.] Appellants were first sent to the Santa Anita Assembly Center at Arcadia, California where they remained until about October 18, 1942, at which time they were transferred to the Gila River Relocation Center, Gila River, Arizona. [Tr. of R. 17, 29; R. T. 167; Ex. U, R. T. 56, 106.]

While appellants were at Gila River Relocation Center from October 1942 to October, 1943, the Center operated, except for the inconveniences resulting from detention, in much the same fashion as a community outside of the Center. [R. T. 226-246.] Community Government was established and in operation. There was full employment. [R. T. 245-246.] Medical facilities were adequate. [R. T. 235.] Educational and recreational facilities were provided. [R. T. 226-229.] The conditions existing at Gila River Relocation Center were markedly different from those existing at Tule Lake, as described in *Acheson v. Murakami*, 176 F. 2d 953 (9th Cir., 1949). [R. T. 244-245, 307.] Gila River was relatively peaceful. There were few, if any, disturbances such as those which prevailed at Tule Lake. [R. T. 27, 34, 90, 236, 307.]

During 1943, the evacuees at Gila River Relocation Center performed many services for the United States war effort. The Japanese evacuees worked in a camouflage net factory that was operated by the Army. [R. T. 232.] Evacuees volunteered for an army language school. [R. T. 236.] Many of the evacuees at Gila River volunteered for military service. [R. T. 236.] The evacuees constructed a memorial to honor the Japanese who had enlisted in the United States Army. [R. T. 237.] The evacuees also worked in a model ship factory whose products aided the identification of warships of Germany and Japan. [R. T. 240-241.]

At Gila River, 9,746 persons registered for the Army Enlistment and WRA Leave-Clearance Registration Program in 1943. Of these registrants, 8,823 answered "Yes" to Question 28, which asked whether the registrant was willing to defend the United States and forswear allegiance to foreign forces. [Pltf. Ex. 1, p. 199, R. T. 24-25.]

On February 12, 1943, appellant Norio Kiyama signed a form entitled "Statement of United States Citizen of Japanese Ancestry." In executing questions 27 and 28 of this form, appellant stated that he was unwilling to serve in the Armed Forces of the United States and was unwilling to swear unqualified allegiance to the United States and to faithfully defend it from attack by foreign forces. [Tr. of R. 17-18; Ex. A, R. T. 197.] On the same date, appellant also signed a form entitled "Application for Leave Clearance". In executing this form plaintiff indicated therein that he did not desire employment in any part of the United States. [Tr. of R. 18; Ex. B, R. T. 200.]

On March 1, 1943 appellant Miyoko Kiyama also signed a form entitled "Application For Leave Clearance". On this form said appellant indicated that she desired no employment and would not take employment in any part of the United States. She also stated in questions 27 and 28 that she was unwilling to volunteer for the Army Nurse Corps or the Woman's Army Auxiliary Corps and was unwilling to swear unqualified allegiance to the United States of America and to forswear allegiance to the Japanese Emperor. [Tr. of R. 29-30; Ex. T, R. T. 53, 106.]

On June 30, 1943, appellant Miyoko Kiyama signed a form entitled "Individual Request for Repatriation". In executing this form the appellant requested that she be repatriated to Japan. [Tr. of R. 30; Ex. U, R. T. 56, 106.] On June 31, 1943 Norio Kiyama signed two forms entitled "Individual Request for Repatriation" and "Request for Repatriation—Family Summary". In executing these forms plaintiff requested that he and his family be repatriated to Japan. [Tr. of R. 18-19; Ex. C, R. T. 203.] On July 28, 1943, Miyoko Kiyama again executed an

"Individual Request for Repatriation." [Tr. of R. 30; Ex. V, R. T. 106.]

During October 1943 the appellants were transferred to the Tule Lake Segregation Center. Before being transferred, the oppellants were given an opportunity to change their "no-no" answers to questions 27 and 28. [Tr. of R. 19, 31; R. T. 83, 199.] The appellants failed to change their answers, knowing that if they did not do so, they would be transferred to Tule Lake. [Tr. of R. 19, 31; R. T. 219-220.]

After being transferred to the Tule Lake Segregation Center, appellant Norio Kiyama became a member of the Hokoku Seinen-dan, a militant pro-Japanese organization. Appellant Miyoko Kiyama became a member of the Hokoku Joshi Seinen-dan, which was the counterpart of the men's organization. [Tr. of R. 20-32; Ex. F, R. T. 275-276; Ex. W, R. T. 100, 106.]

On April 27, 1944, Norio Kiyama signed a form entitled "Request for Repatriation—Family Summary". On this form appellant indicated a desire that he and the members of his immediate family be repatriated as a family group. [Ex. E, R. T. 31, 269.]

On October 15, 1944, both Norio and Miyoko Kiyama wrote letters to the Attorney General of the United States requesting advice as to what legal steps should be taken to renounce their American citizenship and the citizenship of their family. [Ex. X, R. T. 61, 106; Ex. G, R. T. 279.]

On November 10, 1944, both appellants executed and submitted to the Attorney General a form entitled "Application for Permission to Renounce United States Nationality", in which they requested that their citizenship

be renounced. [Tr. of R. 21, 32; Ex. H, R. T. 282; Ex. Y, R. T. 112.] On November 14, 1944, appellant Norio Kiyama wrote a letter to the Attorney General seeking to add to his said Application by stating that he had had military training while in Japan for three years under the Japanese Army. [Tr. of R. 21; Ex. AA; R. T. 116.]

On December 7, 1944, a hearing on Norio Kiyama's renunciation of citizenship was held before John L. Burling, Hearing Officer. At this hearing appellant stated, among other things, that he desired to renounce his American citizenship; that he signed the application to renounce freely and voluntarily; that before Pearl Harbor his loyalty was to Japan, and that his loyalty was still with Japan; that he hoped and believed that Japan would win the war; that "The spirit of Japan is so strong it will be able to win"; and that "I think the Emperor is the highest power and I worship him". [Ex. J, R. T. 284-288.]

On December 7, 1944, Miyoko Kiyama's renunciation of citizenship hearing was held. At this hearing she stated, among other things, that she signed the application to renounce citizenship freely and voluntarily, that when she returned to this country in 1938 her loyalty was to Japan rather than to the United States; that before December 7, 1941, her loyalty was with Japan; that her loyalty still was with Japan; and that she would like to see Japan win the war. [Ex. Z, R. T. 113.]

Norio Kiyama renounced his citizenship at Tule Lake on December 13, 1944 by signing a form entitled "Renunciation of United States Nationality". Appellant Miyoko Kiyama renounced her citizenship on December 12, 1944. On December 23, 1944 these renunciations were approved by the Attorney General as not being con-

trary to the interests of national defense. [Tr. of R. 22, 33; Ex. K, R. T. 288; Ex. AA, R. T. 116.]

On December 27, 1944, Norio Kiyama was removed from Tule Lake and interned at the Internment Camp at Santa Fe, New Mexico. Said appellant was designated as one of the seventy leaders in the reign of terror in Tule Lake, referred to in Finding of Fact 35 in *Murakami v. Acheson,* 176 F. 2d 953 (9th Cir., 1949). [Ex. L, R. T. 289.]

On October 19, 1945, Norio Kiyama signed a form letter entitled "Petition for Repatriation" in which he requested that his family be repatriated to Japan. [Ex. P, R. T. 296.] On or about March 1, 1945, Norio Kiyama signed and submitted to the Attorney General a letter in which, among other things, he requested that he be furnished with a certificate of expatriation. [Ex. Q, R. T. 297.]

On September 27, 1954, while still at Santa Fe Internment Camp, he signed a form entitled "Application for Repatriation", on which he indicated a desire to be repatriated to Japan unconditionally and whether or not his family accompanied him. On this form he stated, among other things: "I have been always loyal to Japan during the war and I have no intention to change my loyalty to any other country at this time." [Ex. R, R. T. 299.]

On or about December 28, 1945, appellants Norio and Miyoko Kiyama voluntarily left the United States and returned to Japan. They remained in Japan from sometime during 1946 until sometime during 1950 at which time they returned to the United States on a Certificate of Identity for the purpose of prosecuting this action. [Tr. of R. 23, 33.]

ARGUMENT.

Preliminary Statement.

Appellants have adopted the general legal position set forth in the appellant's brief in *Yamamoto v. Dulles,* No. 15422, and have merely summarized their contentions herein. Therefore, appellee has prepared his argument upon the assumption that all the arguments set forth in the *Yamamoto* brief, where possibly applicable, are made herein. If, in some instances, this is not the case, appellee regrets the resulting surplusage of argument.

I.

Presumption of Involuntary Renunciation.

Because of the oppressive conditions prevailing at Tule Lake (see *Acheson v. Murakami,* 176 F. 2d 953 (9th Cir., 1949)), this Court has held that a rebuttable presumption of involuntary renunciation exists for those renunciants confined at Tule Lake. *McGrath v. Abo,* 186 F. 2d 766, 773 (9th Cir., 1951). When substantial evidence rebutting the presumption is introduced, the burden of proving the voluntary nature of the renunciation is upon the plaintiff. *Ibid.* Appellants herein contend that the Government's evidence was not sufficient to overcome the presumption.

First, appellants argue that their Tule Lake activities should be ignored because they "did nothing different than did the thousands of others who renounced and engaged in activity before the renunciation." This argument fails to take into account what this Court stated in *McGrath v. Abo, supra,* namely, that "the record shows the certainty that many of the 4315 plaintiffs who voluntarily renounced were disloyal to the United States" and that of the Kibei,

"persons sent by their parents to Japan for their education, . . . some were 'permanently pro Japanese.'" Appellants do not, and cannot, point to evidence in the record which shows that their activities were solely like those of the loyal renunciants and unlike those of the disloyal. Consequently, there is more than ample justification for considering their conduct at the place of, and near in time to, their renunciation.

Next, appellants would also have us disregard their pre-Tule Lake activities because of the goadings of powerful agitators and the oppressiveness of imprisonment at Gila River. However, no presumption of coerced activity exists except with respect to Tule Lake. *McGrath v. Abo,* 186 F. 2d *supra* at page 774. As set forth in the Statement of the Case, conditions at Gila River were entirely different than at Tule Lake. Moreover, 8,823 out of 9,746 registrants were able to express their loyalty to the United States by a "yes" answer to Question 28, and confinement of the majority did not prevent them from contributing to the war effort of the United States. Thus, appellants' minority action of giving a "no" answer would appear to be significant. A similar "no" answer in *Murakami v. Dulles,* 221 F. 2d 588, 589 (9th Cir., 1955), evidently was the basis for sustaining a trial court's finding that it refused to believe the testimony of a renunciant.

Moreover, appellants were given the opportunity to change their "no" answers prior to removal to Tule Lake. [Tr. of R. 19, 31; R. T. 199, 83.] They did not do so, however, because they felt they would be "sort of ostracized by the people at the camp." [R. T. 83-84, 199.] The desire of approval by a minority group which had expressed disloyalty to the United States and which had

wanted segregation from the "yes-yeses", also would appear to warrant consideration.

Next, appellants contend that their post-Tule Lake activities are not sufficient to overcome the presumption of involuntary renunciation, but do so without argument. (The arguments made in the *Yamamoto* brief are not applicable to the Kiyamas.) These activities consisted of requesting repatriation and of voluntarily returning to Japan after the war was over. More than silent argument is needed to establish that such activities are not helpful indicia of voluntary renunciation.

In *McGrath v. Abo,* 186 F. 2d *supra* at page 774, this Court stated that certain proposed evidence of the Government would overcome the presumption afforded Tule Lake renunciants. The offers of proof therein consisted of facts such as that renunciants had spent their formative years in Japan, had voluntarily returned to Japan subsequent to renunciation, had been active members of pro-Japanese groups at Tule Lake, had applied for repatriation prior to renunciation, had answered Question 28 in the negative, or had otherwise demonstrated that their renunciation was voluntary. In the present cases, *all* such factors were present with respect to both appellants, as is set forth in the Statement of the Case. Thus, the evidence of the appellee would seem to be sufficient to overcome the *Abo* presumption.

II.
Burden of Proof.

It is contended that the trial court erroneously placed the burden of proving the involuntary nature of renunciation upon the appellants. Considerable time is devoted to arguing that *Gonzales v. Landon,* 350 U. S. 920, established a rule contrary to that announced in *McGrath v. Abo,* 186 F. 2d 766, *supra.* However, appellants admit that their identical argument was rejected in *Nishikawa v. Dulles,* 235 F. 2d 135, 141 (9th Cir., 1956). If *Nishikawa* is in point, there seems little point in our arguing the matter much further.

In *Nishikawa,* as in the present cases, the ground of expatriation was pleaded in the Complaint and was admitted in the Answer, thus being proved conclusively. [Tr. of R. 3, 8, 10.] And, as in *Nishikawa,* the ground of expatriation (here, renunciation) would seem to require no mental element, or if so, only that the act be knowingly done. In any event, each of the appellants admitted at the trial that they knew the meaning of their act of renunciation, *i.e.,* that their citizenship would be taken away. [R. T. 113, 116, 283, 288.]

In criminal cases, where the burden on the Government is much greater even than the "clear and convincing" evidence rule, the Government is not required to prove that confessions are voluntary, even though confessions are carefully scrutinized by the courts.

Rhodes v. United States, 224 F. 2d 348 (5th Cir., 1955);

Hartzell v. United States, 72 F. 2d 569 (8th Cir., 1934);

Ah Fook Chang v. United States, 91 F. 2d 805 (9th Cir., 1937);

Gray v. United States, 9 F. 2d 337 (9th Cir., 1926);

Murphy v. United States, 285 Fed. 801 (7th Cir., 1923).

No greater burden should be upon the Government in a civil case; thus, proof that the act of expatriation was knowingly made should be more than sufficient to sustain the Government's burden of proof on this point.

As appellants have pointed out, however, the *Nishikawa* case is before the Supreme Court, and appellee is informed that reargument therein has been scheduled for next year. Even if that Court should decide that the burden of proving voluntary renunciation is upon the Government, appellee submits that that burden has been sustained here.

The trial court did not merely find that appellants had not sustained their burden of proving voluntary renunciation; the court went much further and made affirmative findings as to both appellants as follows:

> "It is not true, as alleged in plaintiff's Complaint, that plaintiff's renunciation of United States nationality was the result of coercion, fears, confusion and mistake; nor is it true, as alleged, that such renunciation was not his free and voluntary act.
>
> "It is true that plaintiff's renunciation of United States nationality was his free and voluntary act." [Tr. of R. 23-24, 34.]

Thus the language of the findings demonstrates that the court did not merely conclude that appellants had not

sustained their burden, but specifically found that the facts were contrary to their contention. All doubt as to this matter is dispelled by the court's findings that (1) it did not believe the testimony of either appellant; (2) that their sympathies and loyalties lay with Japan; (3) that before, during, and after renunciation, appellants desired to be repatriated to Japan. [Tr. of R. 19, 24, 31, 34; see also R. T. 323, 324, 326; *cf.* R. T. 125-127.]

The primary evidence of the appellants, aside from the *Abo* presumption, on the crucial question of voluntary renunciation, came from their own lips. This evidence the trial court did not believe, and it is proper for a court to conclude that the truth lies just the opposite of testimony given by witnesses a court deems untrustworthy. *Nishikawa v. United States,* 235 F. 2d *supra* at p. 140. In any event, the documentary evidence of the Government showing the appellants' persistent, continuous, and overt expressions of disloyalty to the United States, and desire to return to Japan, coupled with the court's disbelief of the appellant's present version of their activities, constituted clear and convincing proof, if such be necessary, of the voluntary nature of their renunciation. Since such was the evidence, and since the court specifically found that the renunciations were voluntary, it is immaterial upon whom the trial court considered the burden of proof. Such an erroneous conclusion of law would be harmless error (*Craig-Giles Iron Co. v. Brownlee,* 272 Fed. 74 (4th Cir., 1921), even if the doctrine of *Gonzales v. Landon, supra,* be held to apply to cases of this type.

III.
Findings of Fact.

Appellants contend that the findings of fact are not supported by sufficient evidence. The Statement of the Case sets forth the evidence upon which the Government relied at the trial, and it seems unnecessary to repeat such evidence at this point. Suffice it to say that the evidence of appellant's express and bold manifestations of disloyalty to the United States over the period February 12, 1943 through December 28, 1945, abundantly supports the findings that appellants voluntarily renounced their citizenship.

However, appellants argue, in effect, that one should not draw inferences adverse to them from such evidence, because the oppressive conditions under which appellants existed caused them to perform acts which did not reveal their true feelings. Such an argument is better made to a trier of fact; the trial court's determination of the conflicting evidence, as expressed in its findings of fact, can be set aside only if "clearly erroneous" and due regard must be given to its opportunity to judge the credibility of the witnesses.

Fed. Rules of Civ. Proc., Rule 52(a);

Martin v. Be-Ge Mfg. Co. of Gilroy, 232 F. 2d 530 (9th Cir., 1956) (and cases cited therein).

Since the trial court disbelieved appellant's explanations of their disloyal actions, it would seem that the findings upon credibility are crucial. If such findings are upheld, then not only does the Government's evidence remain uncontradicted, but additional strength is lent to it by the very reason of the disbelief of the attempted explana-

tion thereof. Therefore, some of the evidence especially pertinent to the findings upon credibility will be reviewed.

A. As stated previously, *Murakami v. Dulles,* 221 F. 2d 588, *supra,* apparently stands for the proposition that a pre-Tule Lake expression of refusal to serve in the United States Armed Forces, to swear unqualified allegiance to the United States, and to forswear allegiance to the Japanese Emperor, is sufficient evidence to support a trial court's finding that a renunciant's testimony as to involuntary renunciation was unbelievable. Here, both appellants made such statements before being sent to Tule Lake, [Ex. T, R. T. 53, 106; Ex. B, R. T. 200.]

B. Appellant's testimony that their continuous expressions of disloyalty over the period 1943-1945 were all as a result of fear or coercion is not inherently believable. Especially is this so when the great majority at Gila River did not answer "no" to Questions 27 and 28, and did not submit requests for repatriation, as did appellants. Furthermore, the bold and insulting nature of appellants' remarks in their renunciation hearings not only indicate their true feelings, but, as well, a lack of fear of officials of the United States. If appellants were fearless enough to be so brazen with the Government having custody and control over them, it is reasonable to infer that they were not so intimidated by other evacuees as to renounce their citizenship and return to Japan.

C. Norio Kiyama's tale of being "forced" into the Hokoku Seinen-dan similarly can be given little weight. Although all his disloyal actions over a two-year period were allegedly prompted by fears of the pro-Japanese evacuees, when his name was entered into the roll of the Hokoku, appellant stated his indignation to his spon-

sor, who undoubtedly also must have been a member. [R. T. 175.] His indignant attitude towards a Hokoku member at being named to membership in that pro-Japanese organization does not seem consistent with his alleged fears of not being considered a loyal Japanese.

For still additional reasons, it is apparent that appellant was not too afraid of the pro-Japanese, as he testified never did anything in his capacity as clerk for the Hokoku, never went to meetings of the organization, went to only one speech, and only two or three times participated in morning exercises. [R. T. 176.] Yet appellant states he was sufficiently afraid of the Hokoku to have given up the priceless heritage of his citizenship.

Appellant's testimony as to lack of activity in the Hokoku Seinen-dan also was not very consistent with his being named as one of the seventy leaders and officers of the segregation group who were the most active leaders in the reign of terror which existed at Tule Lake during the renunciation hearings. [Tr. of R. 22; Ex. L, R. T. 289-290.]

D. Still more incredible was Norio Kiyama's reason for returning to Japan after the war, namely, that he was afraid of the pro-Japanese in the camp. [R. T. 296.] Yet, his testimony was that he had planned to rescind his renunciation of American citizenship "as soon as I arrived in Japan." [R. T. 303.] Perhaps the times were troubled and unusual, but even in retrospect, Japan would seem a strange place to go if one wished to escape pro-Japanese pressure. Appellant never explained why he thought it would be so easy to rescind his renunciation once in Japan, and so difficult to express his loyalty to the United States while here and under its protection.

In the same vein, appellant testified that if he had been deported to Japan during the war by reason of his "coerced" disloyal statements, he felt that there would not be the same kind of pro-Japanese pressure against him there as there was in the Relocation Centers. [R. T. 319.] Appellant continues his amazing recitation by testifying that, even if he had been mistreated in Japan, he would have told Japanese officials that he was an American and would not fight in the Japanese Army against the United States. [R. T. 319, 320, 322.] These remarks either came from a very brave man or from a liar. In either case, it was reasonable for the trial court to view with great suspicion appellant's claim of renunciation through fear.

E. The trial court further found incredible appellant's testimony that, while he was loyal to the United States upon his return to this country from his Japanese schooling, and was aware of Pearl Harbor, and was still loyal to the United States in 1941 [R. T. 190], nevertheless he never gave a single thought during the entire war as to which side would win. [R. T. 191, 192, 324.]

F. As to Mrs. Kiyama, the district judge apparently disbelieved her testimony as to involuntary renunciation because of her maintenance of a Yokohoma bank account from 1938 through 1943 [R. T. 125] and registration of her children with the Japanese consulate in order to obtain Japanese citizenship for them. [R. T. 126-127.] In addition, the court specifically found that her demeanor while testifying was not convincing, her responses to questions were vague and contradictory, and that her testi-

mony had been impeached. [Tr. of R. 34.] As was held in *Nishikawa v. United States,* 235 F. 2d 135, *supra:*

> "The trier of fact need not accept the uncontradicted testimony of a witness who appears before it, and the demeanor of that witness may be such as to convince the trier that the truth lies directly opposed to the statements of the witness. [citations]."

The foregoing evidence, and inferences which may be drawn therefrom, demonstrate that substantial evidence supported the findings of fact, and that they are not clearly erroneous.

Conclusion.

The evidence below clearly shows that the judgment of the trial court should be affirmed.

Respectfully submitted,

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